IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10067 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ARUNBHAI MADHUBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10067 of 2002

MR VH THAKORE for Petitioner No. 1

MR DESAI, AGP for Respondent No. 1

MR PJ KANABAR for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 30/07/2003

ORAL JUDGEMENT

Heard the learned advocate Mr.V.H.Thakore for the petitioner and learned advocate Mr.Kanabar for respondent

No.2 and learned Assistant Government Pleader Mr.Desai appearing on behalf of respondent No.1.

2) This Court has issued notice on 8th October, 2002, after considering the relevant regulation of the respondent No.2 and this Court has made it clear that notice has been issued for final disposal returnable on 28th October, 2002.

3) In the present petition, the petitioner has challenged the punishment order dated 19th April, 2002 wherein the disciplinary authority has imposed punishment of censure and suspension period from 5th March 2001 to 30th July, 2001 is treated as suspension period and the same has been directed to be considered as a leave without pay. It is necessary to note here that there is no reply filed by the respondents. The Appeal filed by the petitioner against said punishment is also rejected by the Appellate Authority.

4) Initially, the suspension order has been challenged by the petitioner before this Court in Special Civil Application No.2507/2001 and this Court by order dated 11th December, 2001 directed to the respondent to consider the suspension period whether on duty or not after the result of departmental inquiry. It is also necessary to note that suspension order is dated 5th March, 2001 and the same has been revoked by order dated 30th July, 2001. In light of this, whether at the time when the suspension order has been passed by the respondent - authority, the relevant regulation of the Corporation incorporated in Section III was considered or not. The relevant regulation 77 and 78 are quoted as under :

77. Power to suspend :

Without prejudice to these Regulations, an employee may be placed under suspension by the concerned disciplinary authority competent to impose major penalties provided that in the case of Class - I Officer the Managing Director may exercise the power to suspend but he shall immediately afterwards report all the facts of the case known to him to the Chairman and to the Board/Executive Committee at its first meeting after issue of the order of suspension for consideration and approval.

78. When an employee may be suspended :

(1) Suspension should be ordered only when the circumstances are found to justify it and the discretion should be exercised with care. The general principle would be that ordinarily suspension should not be ordered unless the allegation made against an employee are of a serious nature and on the basis of evidence available or there is reason to believe that his continuance in active service is likely to cause embarrassment or to hamper the investigation of the case or prejudice investigation, trial or any enquiry or subserve discipline or to cause public scandal or any other reason deemed fit by the concerned disciplinary authority competent to impose major penalty.

(2) An employee may be suspended as allegations are made even before investigation or during investigation or preliminary enquiry or at any time before, during or after the departmental enquiry.

(3) In the cases other than those mentioned in sub - regulation (1) it will suffice if steps are taken to transfer the employee concerned to another place, to ensure that he has no opportunity interfere with the witnesses or to hamper with the evidence against him.

(4) Where the penalty of dismissal, removal or compulsory retirement from service imposed upon an employee under suspension is set aside in appeal or on review under these regulations and the case is remitted for further enquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force until further orders.

(5) Where a penalty of dismissal, removal or compulsory retirement from service is imposed upon an employee is set aside or declared or rendered void in consequence of, or by, a decision of a court of law; and the disciplinary authority, on a consideration of the circumstances of the case, decides to hold a further enquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the employee shall be deemed to have been placed under suspension by the authority competent to

place under suspension from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders.

(6)

(a) An order of suspension made or deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise) and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by it in writing, direct that the employee shall continue to be under suspension until the termination of all or any of such proceeding.

(b) An order of suspension made or deemed to have been made under these Regulations may at any time be modified or revoked by the authority which made or is deemed to have been made the order or by any authority to which that authority is subordinate."

5) Bare perusal of this Regulations 77 and 78 the relevant Regulation is 78 sub-clause (1), which provided that suspension should be ordered only when the circumstances are found to justify it and the discretion should be exercised with care. The general principle would be that ordinarily suspension should not be ordered unless the allegation made against an employee are of a serious nature and on the basis of evidence available or there is a prima facie case for his compulsory retirement, removal or dismissal or there is a reason to believe that his continuance in active service is likely to cause embarrassment or to hamper the investigation of the case or prejudice investigation, trial or any enquiry or subserve discipline or to cause public scandal or any other reason deemed fit by the concerned disciplinary authority competent to impose major penalty. In light of this Regulation 78 sub-clause (1) now looking to the charge levied against the petitioner is that the petitioner was transferred by order dated 11th January, 2001 as a Warehouse Manager but he has not reported at transferred place and without any prior permission of the competent authority he enjoyed the joining leave upto 25th January, 2001 and reported at transferred place on 25th January, 2001. Resuming late after enjoying joining leave, he has not accepted the charge immediately and he reported for sick leave on 30th January, 2001 and thereafter, resumed the duty on 12th February, 2001 even

then he has not accepted the charge that is how the charge levied against the petitioner. The suspension order is at page 137-A, the same charge has been repeated and narrated by the competent authority meaning thereby that he has not obeyed the order of the Superior Officer accepting the charge and anticipating the transfer order and resumed late at transferred place. After narrating this charge, immediately the Managing Director of the respondent No.2-Corporation has passed an order of suspension. By this suspension order requirement of Regulation 78, Sub-clause (1) is not satisfied. No reasons have been given by the competent authority that why the suspension order has been passed against the petitioner. Whether it was considered to be a major misconduct or minor misconduct ? The care which is required to be taken as indicated in Regulation 78 (1) that very care has not been taken by competent authority while suspending the petitioner. When there was no prima facie case for imposition of major penalty, the question of suspending the employee does not arise at all, even Regulation has not permitted to do so.

6) In the absence of the reply from the respondent Corporation what ground or reason has been taken into account for revoking suspension order by order dated 30th July, 2001 is not disclosed in the order of revocation of suspension. Meaning thereby that respondent Corporation come to the conclusion on charge levied against the petitioner has been found to be proved and looking to the charge of punishment of censure has been imposed, along with that finding some observations made by the competent authority that because of the charge is proved against the petitioner his suspension is justified that is not the criteria which has been taken into account by the competent authority. The principle which has to be considered by the competent authority while suspending the employee under Regulation 78 Sub-clause (1) has not been fulfilled by the respondent authority at the time of passing the order of suspension. Meaning thereby, that merely charge has been established against the petitioner or any other employee that itself does not permit to hold that employee is not entitled to full wages of suspension period. For that a specific reason required to be given by the respondent authority. Merely charge is proved against the petitioner that itself is not enough to consider the period of suspension as leave without pay. A specific observation has been made by the competent authority in order of punishment that because the charge has been found to be proved against the petitioner, therefore, the period of suspension has been treated as leave without pay. This observation is absolutely

without jurisdiction and contrary to the Regulation 78, sub-clause (1). The competent authority cannot justify the suspension on the basis of the result of inquiry. They have to justify the suspension as per requirement mentioned in Regulation 78, sub-clause (1) and no such reason has been given and, therefore, considering the entire facts which are on record, according to my opinion the decision which has been given by the competent authority treating the suspension period leave without pay is contrary to the Regulation 78, sub-clause (1) and also it is contrary to the settled principle of law. Therefore, that part of the order of treating the suspension period leave without pay is required to be quashed and set aside.

7) In respect to the punishment part, wherein the only censure has been imposed, this Court is not interfering. Therefore, the submission of Mr.Kanabar in respect to referring finding of Inquiry Officer is not taken into account by this Court because as a result of inquiry the punishment is imposed by the respondent authority on the petitioner and this Court is not interfering with the punishment aspect. This Court is interfering only in respect to the suspension period and, therefore, even considering the Regulation 86, which learned advocate, Mr.Kanabar is emphasising that Regulation 86, sub-clause 2 has given powers to the authority to pass appropriate orders to treat the suspension period as leave without pay or not. Mr.Kanabar also submitted that after completion of the departmental inquiry and punishment it is for the competent authority to treat the suspension as leave without pay or not. Accordingly, the competent authority has rightly exercised the discretionary power because the charge is established against the petitioner. This submission of Mr.Kanabar is not accepted by this Court, simply on the ground that Regulation 86, sub-clause 1 states that when the employee, who has been dismissed, removed, compulsory retired or suspended is reinstated, the concerned disciplinary authority shall consider and make a specific order. Now in light of this sub-clause (1) and in facts of this case, it is not the case of dismissal, removal, compulsory retirement and, it is the case of suspension only. The suspension order issued by the competent authority on 5th March, 2001 and revoked by order dated 30th July, 2001 on that occasion when the reinstatement is ordered by the competent authority, it is a duty of the respondent-Corporation to consider the case of the petitioner, whether the suspension period is required to be treated on duty or not. That part has not been taken care of by the respondent - Corporation at the

relevant time when the suspension order has been revoked by order dated 30th July, 2001 and reinstatement order has been passed by the respondent - Corporation. Therefore, the competent authority has taken shelter that after the conclusion of the departmental inquiry they will consider the case of the petitioner, whether suspension period is required to be treated on duty or not ? that itself is wrong to consider the suspension period be treated on duty or not because it having no connection with the result of departmental inquiry. Thus, Regulation 86, sub-clause (1) provide that a moment the employee has been reinstated by revoking suspension order, the concerned disciplinary authority, which consider and make specific order, whether or not the said period shall be treated as period spent on duty and pay and allowances to be paid to the employees for the period of his absence from duty. The respondent - Corporation has not taken any decision when the suspension order has been revoked by order dated 30th July, 2001. Even considering the Regulation 86 (1), if the competent authority or concerned disciplinary authority is of the opinion that the employee has been duly exonerated and under suspension, if any, he was placed under suspension was unjustified, the employee shall be given full pay and allowance to which he would have been entitled had he not been dismissed, removed, compulsory retired or suspended, as the case may be. This is not a case of dismissal, discharge or compulsory retirement and it is also not the case that employee remained under suspension till the punishment has been imposed by the competent authority. Looking to the facts of this case, the petitioner was suspended by order dated 5th March, 2001 and suspension order has been revoked on 30th July, 2001. Therefore, immediately it was require to exercise discretionary powers of the competent authority to consider whether the suspension period is treated on duty or not and it has no connection with the result of departmental inquiry because employee was not remained under suspension till the departmental inquiry has been concluded. Even considering the punishment of censure, the direction of competent authority to treat suspension period as suspension itself is unjustified because it amounts to punishment to the petitioner, meaning thereby, two punishment are imposed to the petitioner. If initial order of suspension dated 5.3.2001 is not in accordance with Regulation 78 and after revocation order dated 30.7.2001 immediately not decided the question, then at the end of inquiry at the time of punishment order, said period of suspension has been treated as suspension itself is not justified and discretion which exercised by the authority contrary to Regulations 86 [2]. Being

minor lapses on the part of the petitioner not justified said direction of treating suspension period as suspension.

However, at this stage, it is pertinent to refer the Regulation 86[1] and [2] which reads as under :-

"86. Pay and allowance on Re-instatement :

[1] When an employee who has been dismissed, removed compulsorily retired or suspended is reinstated the concerned disciplinary authority shall consider and make a specific order:

[a] Whether or not the said period shall be treated as a period spent on duty; and

[b] Regarding the pay and allowance to be paid to the employees for the period of his absence from duty.

[2] Where the authority mentioned in sub regulations [1] is of the opinion that the employee has been fully exonerated and the suspension, if any, under which he was placed was unjustified, the employee shall be given the full pay and allowances [other than allowances granted to him for the performance of any specified duty] to which he would have been entitled had he not been dismissed, removed, compulsorily retired or suspended, as the case may be."

8) Normally the procedure which requires to be followed by the employer in case when any misconduct committed by an employee during the course of employment, then, firstly he should have to follow the guidelines that in light of the allegations made against the employee, whether it is necessary to suspend the employee or not. There are relevant establishment factors that ordinarily suspension order should not have been passed unless when the circumstances are found to justify it and discretion should be exercised with care and caution. It is also established and settled position of law that unless the allegations made against the employee are of serious nature and on the basis of evidence available, prima facie case attributes major penalty and his active service is likely to cause embarrassment or to hamper the investigation of the case or prejudice investigation, inquiry, trial, subserve discipline or to cause public scandal. In other words, a moment misconduct has been

committed, the competent authority should have to apply its mind considering the gravity of charge and the circumstances, whether suspension is justified or not. In each case of misconduct committed by the employee, suspension order is not a routine matter and / or course which can be adopted against the employee irrespective of the fact whether misconduct is in serious nature or not and whether it would result into major punishment finally. The effect of suspension against the employee which ultimately suspends the life of the employee in all respects. It is not merely a stigma against an employee alone but it is a stigma against the family as a whole and it amounts to social stigma against the employee and his family members. A moment employee is suspended, the society will ask the question to each of the family members why the husband and / or father, is suspended. Not only that, this creates some doubt as to general conduct of the employee in the society. It demoralize the employee who has been suspended without any justification. Merely an employee joining services, the employee does not mortgage or barter away his basic rights as human being including his fundamental rights in favour of the employer. Merely, having powers to suspend the employee, it cannot be casually exercised in any case of misconduct. The suspension itself is an inhuman act which is an unpropitious effect on the life of an employee. Therefore, the question is that an employee who has been suspended either at the stage of preliminary inquiry or at the stage of chargesheet, the employee remained under suspension till conclusion of the inquiry or till the order of punishment. After the punishment imposed against the employee in result of inquiry, the question would require to be examined again independently by the competent authority, whether suspension period can be treated as spent on duty or not. At that occasion, it is the duty of the competent authority to consider independently while keeping in mind and considering the punishment imposed against the employee, whether in view of the facts of the case, suspension is justified or not? If at the end of inquiry and at the occasion of issuing punishment order, this aspect shall have to be examined by the competent authority without being influenced by the finding given by the inquiry officer. Merely, punishment has been imposed on the employee, is not enough to say that the employee is not entitled to be treated as suspension period spent on duty. This attitude, conduct and approach of the employer is giving another punishment by exercising the discretionary powers in an arbitrary manner to the employee because at the time of considering the case of the employee, whether suspension period is required to be considered spent on

duty or not, as such, no independent and objective standard has been observed by the employer. Normally, without application of mind and only bearing in mind the result of the inquiry report, suspension period has been treated as suspension. Therefore, according to my opinion, such approach of the employer is giving another punishment to the employee over and above the punishment order issued against the employee in respect of the misconduct committed by the employee. In light of the procedure, which normally should have to be undertaken by the employer. But unfortunately, in most of the cases, the employees are sufferer because of non objective attitude and look in the matter of order passed by the employer while considering whether suspension period can be treated as spent on duty or not. Therefore, considering the facts of the present case, it clearly transpires that no reason is disclosed in suspension order dated 5th March, 2001, and as such, there is no justification mentioned while suspending the employee. Similarly, even there is not justification in revocation of suspension period. It is also necessary to note that suspension order has been revoked during pendency of inquiry, then what is the purpose to suspend the employee during pendency of inquiry, meaning thereby, the order of suspension was absolutely not justified when it was passed against the petitioner. This aspect has not been taken into account by the competent authority and at the time of passing the punishment order, period of suspension has been treated as suspension being the other punishment imposed by the competent authority as punishment of censure is not enough. Thus, these two types of approach not to apply the mind independently and objectively to consider whether suspension was at all justified or not. This is very requirement under Regulation 86[2] of the Service Regulations of the respondent Corporation. In light of this background and considering the facts of the present case, the view taken by the Apex Court in case of M.PAUL ANTHONY V. BHARAT GOLD MINES LTD. reported in 1999 Lab I.C. 1565. The relevant observations made by the Apex Court in para-29 are referred as under :-

"29. Exercise of right to suspend an employee may be justified on the facts of a particular case. Instances, however, are not rare whether officers have been found to be afflicted by "suspension syndrome" and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employee's trivial lapse which has often

resulted in suspension. Suspension notwithstanding, non payment of Subsistence Allowance is an inhuman act which has an unpropititous effect on the life of an employee. When the employee is placed under suspension, he is demobilised and the salary is also paid to him at a reduced rate under the nick name of "Subsistence Allowance", so that the employee may sustain himself. This Court in O.P.Gupta v. Union of India, [1987] 4 SCC observations with regard to Subsistence Allowance [para 15 of AIR]:

"An order of a suspension of a Government servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand v. Union of India [AIR 1958 SC 300] is that he continues to be a member of the Government service but is not permitted to work and further during the period of suspension he is paid only some allowance - generally called subsistence allowance - which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental inquiry is concluded within a reasonable time, affects a Government servant injuriously. The very expression "subsistence allowance" has an undeniable penal significance. The dictionary meaning of the word "subsist" as given in Shorter Oxford English Dictionary Vol.II at p.2171 is "to remain alive as on food : to continue to exist", "Subsistence" means - means of supporting life, especially a minimum livelihood."

9) Therefore, according to my opinion even Regulation 86, Sub clause (1) and (2) and other Regulation 78 also are not rightly appreciated and followed by the respondent Corporation. Therefore, the present petition is required to be partly allowed.

10) In the result, the order passed by the competent authority/disciplinary authority on 19th April, 2002 in respect to treating suspension period as leave without pay is hereby quashed and set aside with a direction to the respondent - Corporation to treat the suspension

period spent on duty for all purposes and pay difference of amount to the petitioner within a period of two months from the date of receiving the copy of the said order.

11) In result, petition is partly allowed. Rule is made absolute accordingly. No order as to costs.

(H.K.Rathod, J.)
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